NO. 50112-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHANE C. GILBERT,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable Karena Kirkendoll, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting trial Exhibits 15, 16, and 17 where the State failed to establish a chain of custody.

2. The trial court erred in entering judgment against Mr. Gilbert for delivery of methamphetamine because the methamphetamine evidence should have been suppressed for failure to establish an adequate chain of custody.

3. The evidence was insufficient to prove that Mr. Gilbert unlawfully possessed methamphetamine .

4. The prosecution failed to prove that Mr. Gilbert constructively possessed the contents of a small closed metal box found on the floorboard of a Toyota 4 Runner in which he was found.

5. Trial counsel's failure to move to exclude untested substance in Exhibit 21 constitutes ineffective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because drug evidence is so unique and is easy to tamper with, it is not admissible unless the proponent establishes a chain of custody with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated. Here the State failed to establish a chain of custody for the methamphetamine found in an orange pouch, where a pouch was obtained from Mr. Gilbert during a

search incident to arrest and where the unopened pouch was taken by a bystander and recovered later by police. Did the police establish a chain of custody with sufficient completeness for admission of Exhibits 15, 16, and 17? Assignments of Error 1 and 2.

2. Where the State proved that a metal box containing methamphetamine was found in a small closed metal box in the passenger area of a Toyota 4Runner in which Mr. Gilbert was discovered on the floor of the vehicle between the front and rear seats, did the State fail to prove he constructively possessed the box and its contents when the 4Runner did not belong to him and in which he was a passenger, and the State failed to establish any connection between the box or the drugs and Mr. Gilbert? Assignments of Error 3 and 4.

3. Did trial counsel's failure to move to exclude an untested substance and where the State did not present testimony from the crime lab technician comparing the untested substance to a known sample of methamphetamine constitute ineffective assistance? Assignment of Error 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

Shane Gilbert was charged in Pierce County Superior Court by amended information with possession of a controlled substance with intent to deliver, alleging that Mr. Gilbert knowingly possessed methamphetamine

with intent to deliver the substance on or about November 20, 2016. RCW 69.50.401(1)(2)(a). Clerk's Papers (CP) 4-5.

a. CrR 3.5 suppression hearing

Before taking trial testimony, the court held a CrR 3.5 hearing on March 1, 2017 regarding statements Mr. Gilbert made to law enforcement while hospitalized following his arrest on November 20, 2016. 1Report of Proceedings[1] (RP) at 17-54. After hearing testimony and argument of counsel, the court found that Mr. Gilbert had the capacity to understand what was occurring and admitted statements Mr. Gilbert made to law enforcement. 1RP at 54. Findings of fact and conclusions of law were entered March 17, 2016. 5RP at 590; CP 97-100.

b. Verdict and sentencing:

The jury found Mr. Gilbert guilty of possession of methamphetamine with intent to deliver as charged. 4RP at 579; CP 67. Mr. Gilbert had an offender score of "7," resulting in a standard range of 60 to 120 months. 5RP at 593. The State requested a sentence at the top of range. 5RP at 594. The court granted the defense request for prison-based DOSA and imposed a sentence of 45 months. 5RP at 607; CP 87.

The court imposed legal financial obligations including $500.00 for victim assessment, and $100.00 felony DNA fee, $200.00 filing fee, and

[1]The record of proceedings consists of the following transcribed hearings: 1RP – March 1, 2017 (suppression hearing, jury trial, day 1); 2RP – March 2, 2017 (jury trial, day 2); 3RP – March 6, 2017 (jury trial, day 3); 4RP – March 7, 2017, (jury trial, day 4); and 5RP – March 17 and March 21, 2017 (sentencing).

$800.00 for witness fees. CP 85.

Timely notice of appeal was filed March 17, 2017. This appeal follows.

2. Trial testimony:

The matter came on for trial on March 1, March 2, March 6, and March 7, 2017, the Honorable Karena Kirkendoll presiding. 1RP at 4-196; 2RP at 202-386; 3RP at 392-521; 4RP at 523-586; 5RP at 587-614.

While on patrol in Bonney Lake, Washington the morning of November, 20, 2017, Pierce County Deputy Sheriff Dennis Miller saw a Toyota 4Runner parked in front of what he described as a "known drug house." 2RP at 245. He ran the vehicle's plate and determined that ownership had changed but the new owner had not transferred the title within the mandatory 45 day period. 2RP at 247.

Deputy Miller continued eastbound on 119th Street and saw the 4Runner back out of the driveway and then proceeded at a high rate of speed westbound on 119th Street. He lost sight of the vehicle when it around a corner, but later saw the vehicle parked in front of a house on 119th Street. 2RP at 248.

There was no one in the driver's seat but Deputy Miller saw a man wearing a red shirt knocking on the front door of the house 2RP at 248. Deputy Miller called Deputy Ken Solbrack to the scene, and after discussing the matter, decided to check the vehicle identification number in the front

windshield to see if it matched the license plate. 2RP at 249. While the deputy was looking through the vehicle's windshield, a woman, later identified as Heather Medley, came out of the house and asked if there was problem with the vehicle. 2RP at 250. Deputy Miller asked her to get the person with the red shirt so he could ask him about the vehicle, and then walked around to the passenger side of the 4Runner to look at the ignition to see if had been tampered with or "punched." 2RP at 250. While looking through the rear passenger window, he saw a body from the waist down wearing blue jeans located on the floor of the vehicle between the back seat and front seat. 2RP at 250. The top half of the body was hidden from view by clothing and a shop vac. 2RP at 250. The deputy knocked on the vehicle several times but did not see movement. 2RP at 251.

David Brown, the man whom the deputy had previously seen wearing a red shirt, emerged from the house, but had apparently changed his shirt and was now wearing a grey hooded sweatshirt. 2RP at 251. A woman the deputy knew as Krystal Nyland also came out of the house. 2RP at 252.

Concerned that the vehicle contained either a body or a person in medical distress, Deputy Miller opened the rear door on the driver's side, and as he did, he could feel something pushing against the door from the inside. 2RP at 253. The door popped open from the weight against it, and as it did, Deputy Miller saw the right hand of the person "quickly move to

his waistband area." 2RP at 253. Deputy Miller told the man, whom he recognized as Shane Gilbert, not to reach for his waistband. 2RP at 254. Mr. Gilbert was taken into custody on a Department of Corrections warrant and was searched incident to arrest. 2RP at 254.

Deputy Miller stated Mr. Gilbert was wearing a jacket and that he searched his pockets. 2RP at 255. He testified that he found a glass smoking device and an orange pouch in a jacket pocket. 2RP at 256. He found a small clear Ziploc baggie in his jeans pocket that contained a white crystal substance that he believed to be methamphetamine, and $40.00. 2RP at 256. Exhibits 4, 8, and 9. The orange pouch was placed unopened on the hood of his patrol car along with other items. 2RP at 255, 3RP at 402. Deputy Solbrack testified that neither he nor Deputy Miller opened the orange pouch prior to putting it on the hood or the vehicle. 3RP at 402-03.

While being patted down during the weapons search, Deputy Miller stated that Mr. Gilbert "started to go weak-kneed or wobbly kneed" and went down on the ground and started to have a seizure. 2RP at 271. Deputy Solbrack called for medical aid. 2RP at 272.

Mr. Gilbert's seizure continued as David Brown was recording the scene with his cell phone, at which point Krystal Nyland began yelling that Mr. Gilbert was hypoglycemic. 2RP at 272. She went back into the house and then returned with a container of chocolate pudding, which she opened, put some on her finger and attempted to put in Mr. Gilbert's mouth. 2RP

at 272. Ms. Nyland was kneeling next to Mr. Gilbert and Deputy Miller stated that "something was said, but I couldn't make out what was said between them." 2RP at 273. As Deputy Miller remained kneeling and held Mr. Gilbert, Ms. Nyland stood up, grabbed the orange pouch from the hood of the patrol car and ran down the street. 2RP at 274. He stated that Ms. Nyland ran south on 198th Ave E to 120th Street E. 2RP at 278. Exhibit 6.

Both deputies were initially stunned at the occurrence, and then Deputy Solbrack ran after her toward 198th Ave E for approximately fifteen seconds, then returned to get his patrol vehicle. 2RP at 274, 356. After stopping the foot pursuit and turning around to get his vehicle, he lost sight of Ms. Nyland. 3RP at 404.

After resuming the search in his patrol car, Deputy Solbrack spoke with a witness and then found Ms. Nyland hunched down behind blackberry bushes and took her into custody. 2RP at 358. She did not have the orange pouch in her possession. 3RP at 405. Ms. Nyland and had a credit card in her back pocket issued in her name and a small amount of methamphetamine. 2RP at 365.

Thomas Lewis was in his car on 120 St. E. the morning of November 20, 2016 and pulled over to yield to a firetruck behind his vehicle. 2RP at 332. While stopped on the shoulder near the intersection with 198th Ave. E, he saw a woman with green hair "staggering down the

road" and carrying a paper bag. 2RP at 332. He stated that she fell several times into the ditch and then got up and continue running. 2RP at 333. He stated that when she fell, she crawled about halfway up the embankment and tried to throw the bag into the bushes, "but she didn't throw it very far." 2RP at 333. He said that she crawled up the embankment, picked up the bag and threw it further into the bushes. 2RP at 333. She then crawled down the embankment, ran toward his car, and then ran into a backyard where it appeared that she was attempting to hide. 2RP at 333.

Firefighters were dispatched to the scene in response to Mr. Gilbert's medical emergency. 2RP at 340. As the firetruck approached the intersection of 198th St and 119th Ave., firefighter Vance Mettlen saw a woman with brightly colored hair running while carrying "something baglike" in her hand. 2RP at 341. He stated that she was moving quickly and tried to throw the bag up in the air, but it fell down by her feet. He stated that she threw the bag a second time, slipped and fell, and then threw it a third time as the firetruck passed her. 2RP at 342.

A K-9 unit arrived where the 4Runner was parked and the dog followed a track west on 119th Street and then south on 198th Avenue, and then east on 120th Street E. 3RP at 420. Levi Redding, the dog handler, testified that while following the dog he found an orange pouch on an embankment in a blackberry patch on the north side of 120th Street E. near the intersection with 198th Ave. 2RP at 278, 3RP at 421.

Mr. Gilbert was taken to the hospital following the incident, and after being administered his ***Miranda*** warnings, was questioned by Deputy Miller. 2RP at 287. Deputy Miller stated that when he told Mr. Gilbert that his charges included possession with intent to deliver, Mr. Gilbert said that "he doesn't sell meth and that he didn't have any meth on him either." 2RP at 287. Mr. Gilbert acknowledged that he "does use meth, though, and he uses a large amount." 2RP at 287.

The 4Runner was searched by Pierce County Deputy Sheriff Eric Jank the following afternoon after police obtained a warrant. 2RP at 281. Deputy Jank found a digital scale, several clear Ziploc baggies and suspected methamphetamine in three Ziploc baggies in a small metal box on the floor behind the passenger seat where Mr. Gilbert had been when Deputy Miller opened the door the day before. 2RP at 283, 3RP at 442, 443-44, 448. Deputy Jank also found a small Tupperware container in the metal box which was coated with white residue. 2RPat 283, 3RP at 438.

Deborah Price, a forensic scientist for the Washington State Patrol Crime Lab, testified that five items were submitted to the lab, including Exhibits 15, 16, and 17, and 21. 3RP at 479-80. She testified that the contents of Exhibit 15 weighed 2.8 grams and Exhibit 16 weighed 52.5 grams. 3RP at 488. Exhibit 21 contained three baggies which Ms. Price weighed together as a gross weight of 36 grams, but did not open two of the baggies for testing. 3RP at 483. She stated that the single bag from

Exhibit 21 tested positive for methamphetamine. 3RP at 492.

A jail recording from Mr. Gilbert on November 21, 2017 was played to the jury in which he stated "they hit me with 101 grams" and "I had five ounces on me, and I dropped off two to Michelle." 3RP at 463, 464. Ex. 27A.

The defense rested without calling witnesses.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE ORANGE POUCH AND METHAMPHETAMINE IN EXHIBITS 15, 16, AND 17 BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY

a. A sufficient chain of custody must be established before a court may admit drugs into evidence.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated to be in substantially the same condition as when the crime was committed. ***State v. Campbell***, 103 Wn.2d 1, 21, 691P.2d 929 (1984). Factors to be considered include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Id.* On appeal, a trial court's decision to admit evidence is reviewed for abuse of discretion. *Id.*

Drug evidence, which is not readily identifiable and is susceptible to alteration by tampering or contamination, should be identified by the

testimony of each custodian in the chain of custody from the time the evidence was acquired. ***State v. Roche***, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The proponent of the evidence must "establish a chain of custody 'with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.'" *Id.* (quoting ***United States v. Cardenas***, 864 F.2d 1528, 1531 (10th Cir. 1989)).

b. The State established no sufficient chain of custody for Exhibits 15, 16 and 17.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 68 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. 14; Wash. Const. art. I, § 3; ***City of Seattle v. Slack***, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Jackson v. Virginia***, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); ***State v. Green***,

94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, he State failed to make a sufficient showing that the methamphetamine introduced in Exhibits 15, 16, and 17 were originally in the orange pouch found in the blackberry bushes on 120th St E.

Deputy Miller testified that when searching Mr. Gilbert incident to arrest, he found an orange pouch in the pocket of coat worn by Mr. Gilbert.[2] Without opening the zippered pouch, he put it on the hood of his patrol vehicle. While attending to Mr. Gilbert, who was on the ground in an apparent state of seizure, Ms. Nyland grabbed the pouch and ran west on 119th Street. Deputy Solbrack gave short chase, but returned to get his vehicle after running for approximately fifteen seconds. Two witnesses saw a woman matching Ms. Nyland's description running on 120th Street E, apparently trying to throw a paper bag into blackberry bushes.

Ms. Nyland was apprehended by Deputy Solbrack a short distance away.

During the time that the orange pouch was in the control of Ms. Nyland, the chain of custody was broken. Ms. Nyland had ample opportunity during the time that she possessed the pouch to put the

[2]At trial Mr. Gilbert disputed that he was wearing a coat at the time of his arrest, which was not listed on the inmate property list at the time he was booked into the jail. 3RP at 471. Exhibit 33.

methamphetamine entered as Exhibits 15, 16, and 17 into the pouch. It is noteworthy that Ms. Nyland had methamphetamine in her pocket when she was taken into custody, showing that she had access to methamphetamine at the time of her unauthorized control of the pouch. Moreover, she would have wanted to jettison any methamphetamine that she had on her while running. The break in the chain in custody leaves open the possibly that she put methamphetamine she had on her person into the pouch as she ran.

Under this usual set of circumstances, the State failed to "establish a chain of custody with sufficient completeness to render it improbable that the original item had either been exchanged with another or been contaminated or tampered with." ***Roche***, 114 Wn. App. At 436.

Inasmuch as the conviction for possession with intent to deliver relies in substantial part on the methamphetamine found in the orange pouch, reversal and dismissal of the conviction is required. ***State v. Hickman***, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. MR. GILBERT'S CONVICTION SHOULD BE REVERSED WHEN HE LACKED DOMINION AND CONTROL OF THE VEHICLE, AND THE STATE FAILED TO PROVE DOMINION AND CONTROL OVER THE CLOSED METAL BOX IN THE VEHICLE

In every criminal prosecution, due process requires that the State

prove every fact necessary to constitute the charged crime beyond reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); ***State v. Green***, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The evidence at trial was insufficient as a matter of law to prove Mr. Gilbert guilty of possession of a controlled substance. To find Mr. Gilbert guilty as charged, the State had to prove beyond a reasonable doubt that on or about November 20, 2016, Mr. Gilbert possessed methamphetamine with intent to deliver. CP 4-5; RCW 69.50.401(3); ***State v. Staley***, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

The State sought to prove constructive possession as the evidence failed to establish actual possession. Constructive possession is shown by proof of dominion and control. (Jury Instruction No. 13) ("Constructive possession occurs when there is not actual physical possession but there is a dominion and control over the substance."); see ***State v. Jones***, 146 Wn.2d

328, 333, 45 P.3d 1062 (2002) (discussing possession as a requirement of automatic standing). Proximity alone is insufficient to prove dominion and control. *Id.*

The State failed to prove dominion and control in this case when all it established was Mr. Gilbert's temporary presence in the 4Runner where the metal box containing the stated methamphetamine and untested substance, Tupperware container, unused baggies, and scale were located. Temporary use of premises is insufficient to establish dominion and control over the premises. ***State v. Callahan***, 77 Wn.2d 27, 31, 459 P.2d 400 (1969) (guest staying on houseboat for two to three days did not have dominion and control over the premises). Without dominion and control over the premises, proximity to a controlled substance does not establish constructive possession of that substance: "[T]he rule is that 'where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.'" ***State v. George***, 146 Wn. App. 906, 920, 193 P.3d 693 (2008), quoting, ***State v. Spruell***, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). Under these circumstances, the State failed to establish Mr. Gilbert's dominion and control over the methamphetamine and scales in the box.

Callahan is controlling authority in this case. In ***Callahan,*** the defendant had been staying for two to three days on a houseboat where drugs were recovered, but did not pay rent or maintain the houseboat as a residence. ***Callahan***, 77 Wn.2d 27, 31. Most of the drugs were found near the defendant and he admitted handling the drugs earlier in the day. *Id.*

Similarly, Mr. Gilbert's extremely temporary presence in the 4Runner failed to establish his dominion and control over either the vehicle or the drugs. The evidence established that Mr. Gilbert was not seen in the vehicle when Deputy Miller passed it when it was parked at the "known drug house," as opposed to living in it for several days as the defendant did in the house boat in ***Callahan***.

Moreover, in this case, it was undisputed that the vehicle where the methamphetamine was found did not belong to Mr. Gilbert. He did not have the ability to exclude others from the 4Runner and in fact was not in possession of keys to the vehicle when placed under arrest.

Furthermore, the defendant in ***Callahan*** had actually handled the drugs, whereas, in this case, there was no showing that Mr. Gilbert was even aware of the presence of the box in the 4Runner, the interior of which was cluttered with items including clothing and a shop vac. Accordingly, this case shows even less indication of Mr. Gilbert's dominion and control

than was true in ***Callahan***, and for the reasons the conviction was reversed in ***Callahan***, it should be reversed

In ***State v. Spruell***, 57 Wn. App. 383, 788 P.2d 21 (1990), Division One found "a mere visitor in a house" did not have dominion and control over drugs discovered near him. ***Spruell***, 57 Wn. App. 383, 388. Police, while executing a search warrant at a residence, came upon the defendant near a table on which there was cocaine residue, a scale, vials and a razor blade. His fingerprint was on a plate that had apparently held cocaine and seemed to have been thrown upon the arrival of the police. ***Spruell***, 57 Wn. App. At 384–85. Relying on *Callahan,* the court found this evidence insufficient to support a possession conviction when the State failed to establish a connection between the defendant and either the drugs or the house. ***Spruell***, 57 Wn. App. at 388–89.

As in ***Spruell***, in this case the State also failed to provide evidence of Mr. Gilbert's dominion and control over the drugs themselves. Here, Mr. Gilbert was merely a passenger, had no ownership of the vehicle and no proof of the ability to exclude others from the vehicle. Moreover, there was no evidence that connected Mr. Gilbert to the metal box or the contents. Unlike the constructive possession cases where the driver or passenger is the sole occupant of the vehicle, the presence of others in the

vehicle increases the possibility that the substance was actually placed there by someone other than Mr. Gilbert. Here, Deputy Miller testified that as he approached the parked vehicle, a man later identified as David Brown was knocking on the door and was presumably the driver.

Division One's holding in ***State v. George***, 146 Wn.App. 906, 919, 193 P.3d 693 (2008) is also instructive. In ***George***, police stopped a car carrying three people, none of whom admitted owning the marijuana pipe lying next to George. ***George***, 146 Wn.App. at 912. In that case, no other circumstances linked the defendant to the drugs. For example, there was no "testimony tending to rule out the other occupants ... as having possession," no evidence relating to why and for how long defendant was in the area where police found drugs, and the defendant did not make "statements or admissions probative of guilt ." ***George***, 146 Wn.App. at 922.

In this case the contents of the box were not visible, there was no other evidence linking him to these specific drugs, and he was not the sole occupant of the vehicle. Under these circumstances, no rational trier of fact could have found that Mr. Gilbert a had constructive possession of the box and its contents on the passenger floorboard.

Absent Exhibits 15, 16, and 17, as argued in Section 1, and absent Exhibits 21 and 24, there is no evidence that Mr. Gilbert possessed

methamphetamine with intent to deliver. Therefore, the State has failed to meet its burden and reversal and dismissal of the prosecution is required. ***Hickman***, 135 Wn.2d at 103.

3. COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE UNTESTED SUBSTANCE IN EXHIBIT 21 CONSTITUTES INEFFECTIVE ASSISTANCE

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 225-26. To establish the first prong of the ***Strickland*** test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." ***Thomas***, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective

assistance of counsel. ***Thomas***, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. ***Strickland,*** 466 U.S. at 693; *Thomas,* 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. ***Strickland***, 466 U.S. at 694; ***Thomas***, 109 Wn.2d at 226.

Trial counsel provided ineffective assistant by failing to challenge the admission of the two untested baggies contained in Exhibit 21, and the untested substance on the plastic container found in the metal box in the 4Runner. Ex. 24. The state failed to prove that two of the baggies contained methamphetamine and failed to present adequate circumstantial evidence to prove that the substance in the baggies appeared to be similar to the methamphetamine in the bag that was tested. Deborah Price, the Crime lab technician, testified on direct examination that she tested one of the baggies in Exhibit 21 and determined it contained methamphetamine, but did not examine the other two baggies. 3RP at 483, 492.

A toxicologist may provide random sampling testimony, indicating a tested substance was most likely similar to an untested substance. See ***State v. Caldera***, 66 Wash.App. 548, 832 P.2d 139 (1992). In ***Caldera***, Division 1 held that "scientific testing of a random portion of a substance that is consistent in appearance and packaging is reliable and supports a

finding that the entire quantity is consistent with the test results of the randomly selected portion." ***Caldera***, 66 Wn.App. at 550. The testimony regarding the untested sample, however, must be based on the foundation that the tested and untested materials appeared similar. *Id.*

In this case, the two untested baggies admitted as Exhibit 21, however, do not satisfy this standard. No testimony was presented regarding the appearance of the untested substance in contrast to the tested sample. In ***State v. Crowder***, 196 Wn.App. 861, 385 P.3d 275 (2016), the defendant's conviction for marijuana delivery to minors was reversed with prejudice where Division 3 found that the State failed to establish a link between the tested substance and the substance that was consumed by minors, where at the time of a police search, at least four pill bottles were located inside Crowder's garage, each of which was the potential sources of the substance distributed by Crowder to the minors. ***Crowder***, 196 Wn.App. at 871. Only the contents of one of the four bottles was tested, the court found the evidence was insufficient to establish that the substance that Crowder provided to two minors had the same THC concentration level required to prove the substance was marijuana, in order to prove distribution of controlled substances based on random sampling, where the toxicologist did not compare the substance tested to that

consumed by the minor. ***Crowder***, 196 Wn.App. at 871.

In this case, Ms. Price testified that she weighed all three bags and tested the contents of one bag in Exhibit 21, but did not test the others. 3RP at 483. She did not compare the contents of the contents of the two samples, a foundational requirement announced in ***Caldera*** and ***Crowder.***

Similarly, the white substance on the Tupperware container admitted as Exhibit 24 was also not tested.

There was no legitimate reason for counsel not to seek to exclude the untested substances. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance of counsel. ***State v. Maurice***, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

The State presented very little physical evidence supporting its contention that Mr. Gilbert intended to deliver drugs. There was no controlled buys using a confidential informant and no records showing amounts sold. The State's case was based in large part on the sheer volume of the tested methamphetamine and the untested unknown substances, which was critical to state's assertion that Mr. Gilbert had approximately 140 grams of methamphetamine at the time he was arrested, including approximately 36 grams in the metal box found in the

4Runner. The State argued that this was evidence that he intended to deliver drugs found, and that they were not for personal use. The prejudice generated by admission of the untested bag is overt; the jury was confronted with two additional bags and the Tupperware container from the 4Runner, which Deputy Jank repeatedly claimed had methamphetamine residue on it. 4RP at 436. The deputy prosecutor relied on this evidence during closing argument:

> The other thing you might recall is—how much is this stuff worth? 35 to 40 bucks a gram. And how much of it do you have in this case? You've got about 50 grams one package and 52 in another and 36 almost the three baggies. So about 140 grams. $30 to $40 a gram, take the middle spot,. 35, do your math.
>
> You come out with about $5000 worth of methamphetamine sitting right there on that table. Five grand.
>
> Now, if that's for his personal use, boy, that's a lot of use. That's a lot of value. So does that value tell you something about intent to deliver?

4RP at 573-74.

There was not overwhelming evidence regarding the element of delivery against Mr. Gilbert and the prosecution cannot meet its heavy burden of proving that any reasonable jury would have found Mr. Gilbert guilty of possession with intent to deliver absent admission of the untested baggies.

Mr. Gilbert's defense attorney provided ineffective assistance of

counsel by falling to challenge the admissibly of the untested substance in Exhibits 21 and 24 without a valid tactical justification. ***State v. Saunders***, 91 Wn. App. 575, 580, 958 P.2d 364 (1998). Mr. Gilbert's conviction must be reversed. *Id.*

4. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Gilbert does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including $500.00 victim assessment and $100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. There has been no order finding Mr. Gilbert's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." ***State v. Brown***, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. ***State v.***

Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." ***State v. Nolan***, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

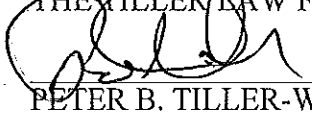
In ***Sinclair***, the Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. ***Sinclair***, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Gilbert's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Gilbert respectfully requests this Court reverse his conviction and remand for a new trial.

DATED: September 18, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on September 18, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, and Michelle Hyer, Pierce County Prosecutor, and a copy was mailed by U.S. mail, postage prepaid, to the following appellate:

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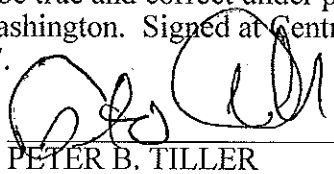
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 18, 2017.



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